



# Commonwealth of Massachusetts State Ethics Commission

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## CONFLICT OF INTEREST OPINION EC-COI-99-5

### FACTS:

The Board of Selectmen of the Town of Amherst appointed you the Town's representative (Councilor) to the Hampshire Council of Governments (Council).

Pursuant to St. 1998, c. 300, Hampshire County government was dissolved. Following the provisions set forth in St. 1998, c. 300, § 45, adding § 30(b) to c. 48 of the Acts of 1997, a majority of voters in the twenty municipalities of the *former* Hampshire County approved the *Hampshire Council of Governments Charter* (Charter) which created the Council. The Charter's Preamble states that the twenty municipalities that were within the former County "have vital common concerns that transcend the borders of individual municipalities" and have adopted the Charter to establish "the means to serve [the] municipalities effectively, and to place the Council of Governments on a firm financial footing in order to deal with regional issues which transcend the existing boundaries of municipal governments." The Council retains powers and duties previously conferred upon Hampshire County and its County Commission except those powers concerning functions transferred to the Commonwealth. See St. 1998, c. 300, §§ 11, 13, 16. As a result of the County's dissolution, the operation and management of the County Jail and the House of Correction, the Registry of Deeds and the court houses were transferred to the Commonwealth. *Id.* at § 11. However, the Council acquired the "historic courthouse at 99 Main Street in the city of Northampton, the Hampshire Care nursing facility on River Road in Leeds, and the land on which they are situated . . . , and the fixtures and improvements located thereon" and leased the courthouse to the Commonwealth for its continued use as the trial court's law library. *Id.* at § 20, amending § 7 of c. 48 of the Acts of 1997. If the Charter had not been approved, "all powers and duties of Hampshire county government [would have been] transferred to the commonwealth effective January 1, 1999." St. 1998, c. 300, § 13, amending § 3 of c. 48 of the Acts of 1997.

The Charter describes the Council as a "body politic and corporate for the purposes of regional cooperation in matters of common interest among the members of the Council." Some of the Council's powers include: the power of eminent domain with respect to any powers of the former County; the power to construct and maintain public improvements; the power to administer trust funds of the former County and to have all possible protections from tort liability afforded to municipalities; the powers of municipalities with respect to creating special fund accounts for the purpose of providing any service authorized by the Charter; the power to establish membership assessments and service charges; the power to retain the powers and authorities of the former County's executive and legislative bodies including any responsibility of the former County for which the Commonwealth has no explicit jurisdiction; and the powers of town selectmen under G. L. c. 41, §§ 52, 56 for approval of bills and warrants. *Charter, Article One.* See also St. 1998, c. 300, § 45, adding § 30(b) to c. 48 of the Acts of 1997.

The Council may accept or participate in any grant, donation or program available to any political subdivision of the Commonwealth as well as in any grant, donation or program made available to counties by any other governmental or private entity. St. 1998, c. 300, § 45, adding § 30(d) to c. 48 of the Acts of 1997; *Charter, Article Five, § 7.* The Legislature authorized the

Commonwealth to provide a grant of \$950,000 to the Council. *St. 1998, c. 300., § 45, adding § 35 to c. 48 of the Acts of 1997.* The grant, however, has not been funded in the state budget and, if it is funded, no additional such legislative grants are anticipated. Although the Council currently has received grants from the Department of Public Safety and the Department of Public Health, most of its funding comes from its member municipalities, described below.

To “provide, purchase or otherwise make available services on a regionalized basis,” the Council may impose a regional assessment, as set forth in the Charter, which shall be allocated among the members of the Council in proportion to their respective equalized valuations as reported to the General Court by the Commissioner of Revenue. The regional assessment shall be based upon the budget the Council adopts and shall be used to provide regional or municipal services or programs, or for planning, organizing and administering such services or programs, and maintaining property in connection with such services or programs. *St. 1998, c. 300, § 45, adding § 30(i) to c. 48 of the Acts of 1997; Charter, Article One, § 2(c) vii.<sup>1/</sup>*

The Council may “sue and be sued . . . contract and be contracted with. . . buy, sell, lease, hold and dispose of real and personal property” as well as “appropriate and expend funds for Council . . . purposes, retain, administer and release trust funds of the former County.” *Charter, Article One, § 2(c) v.<sup>2/</sup>* The former County Treasurer has been designated as the Council’s Director of Finance and has the power and duties of a municipal treasurer pursuant to G. L. c. 41, § 35 and G. L. c. 44, §§ 54, 55 and 55A.

The Council performs several functions. It “may administer and provide regional services to cities and towns and may delegate such authority to subregional groups of such cities and towns.” *St. 1998, c. 300, § 45, adding § 30(g) to St. 1997, c. 48.* It “may enter into cooperative agreements with regional planning commissions or may merge with such commissions to provide regional services.” *Id.* The Council shall determine what regional services it may provide to member municipalities, which may include, but not be limited to, engineering, inspectional services, planning, economic development, public safety, emergency management, animal control, land use management, tourism promotion, social services, health, education, data management, regional sewerage, housing, computerized mapping, household hazardous waste collection, recycling, public facility siting, coordination of master planning, vocational training and development, solid waste disposal, fire protection, regional resource protection, regional impact studies and transportation. *St. 1998, c. 300, § 45, adding § 30(h) to c. 48 of the Acts of 1997.* It has the power “to contract with or enter into agreements with any other entity or governmental unit and to provide jointly or for the other, or in cooperation with other entities, any service, activity, or undertaking which that entity or governmental unit is authorized by law to perform.” *Charter, Article One, § 2 (c) vi.* It may construct, acquire, operate and maintain public improvements, capital projects, personal property and real property or other enterprises for any public purpose. *Charter, Article One, § 2(c) iv.*

The legislative power of the Council is vested in a board of councilors made up of members chosen at municipal general elections for terms of two years. Councilors shall be residents and registered voters of the municipalities that elect them, and shall qualify for the ballot in towns in the same manner as candidates for the board of selectmen and in cities in the same manner as at-large candidates for the city council.<sup>3/</sup> There shall be at least one councilor elected from each municipality, however, “any municipality whose population comprises more than ten per cent of the population of the Council . . . shall elect one councilor for each ten per cent or portion thereof.” *Charter, Article Three, § 1.* The Council shall elect annually from its membership a chairman, vice-chairman, and three other members, no more than one of whom

shall be from any single municipality, to serve as a executive committee. The Council shall choose a moderator, who shall not be a member of the executive committee, to preside over its meetings. *Id. at § 2(a)*. The Council shall meet at least once per month. *Id. at § 2(b)*. The executive committee shall meet at least twice per month and shall report to the Council at least once per month. *Id. at § 2(d)*.

Municipalities that were not within the former County may join the Council under the following conditions: (1) a vote by a majority of the citizens, or a vote of the legislative body of the municipality, at the choice of the municipal executive body; (2) a two-thirds affirmative vote of the councilors of the Council; and (3) a commitment to belong for at least three years. *Charter, Article Two, § 1(b)*. After three years of membership, any municipality may withdraw from the Council by an affirmative vote of its legislative body. *Id. at § 2(a)*.

The Charter may be amended in either of two ways. A proposed amendment shall be submitted to the voters of each municipality only after two-thirds of the weighted votes of the Council approves, or after at least five per cent of the number of residents of the member municipalities registered to vote in the preceding state election signs a petition. Proposed amendments shall become effective if a majority of the voters in the member municipalities approve at a biennial state election held at least ninety days following the Council's vote to submit the amendments. *Charter, Article Seven, §§ 1, 2*.

#### **QUESTION:**

Is the Council a state or municipal agency for purposes of the conflict of interest law?

#### **ANSWER:**

The Council is a municipal agency for purposes of the conflict of interest law and, as a result, you are a municipal employee of each of the Council's member municipalities.

#### **DISCUSSION:**

There is no question that the Council is a governmental entity because governmental actions created it, it performs essentially governmental functions, government officials control it and it receives public funds. See e.g., *EC-COI-95-2*; *EC-COI-94-7*; *EC-COI-92-26*. The issue is whether the Council is a state<sup>4/</sup> or municipal<sup>5/</sup> entity for purposes of the conflict of interest law.<sup>6/</sup>

We have said that the focus of the analysis is on the level of government a public agency serves. *EC-COI-95-2*; *EC-COI-91-3*. "When an agency possesses attributes of more than one level of government, the State Ethics Commission will review the interrelation of the agency with the different government levels in order to determine the agency's status under c. 268A." *EC-COI-91-3*. "We have considered which level of government funds and oversees the entity, and whether the entity carries out functions similar to those of a particular level of government." *EC-COI-95-2*. We conclude, based upon the factors below, that the Council is a municipal agency for purposes of the conflict law, although the Council has a few characteristics which we have associated with state agencies.

Municipalities oversee and primarily fund the Council, and the Council's functions are aimed at serving municipalities regarding, for example, planning, economic development and safety issues. Most of its operating budget is funded from the municipal assessments and service charges. The Council's Director of Finance has the power and duties of a municipal

treasurer. Municipalities, rather than any state agency, choose members to serve on the Council. The Legislature has expressly given the Council certain municipal powers, duties and attributes regarding the handling of finances and tort liability. The Legislature has no role in amending the Charter or in a municipality's decision to join or withdraw from the Council. None of the Council members is required to be a state official or is appointed by state officials. Its enabling legislation and Charter do not indicate that state agencies control it.

We also observe that, in the enabling legislation for the Council, the Legislature expressly allocated certain functions of the former County to the Commonwealth while delegating other functions to the Council. That division of functions indicates that where a public function at the state level of government was required, the Legislature intended the state to control those functions. As a result, the state has determined that it should control the Jail, House of Correction, Registry and courts that were subject to the former County's control. Although the Legislature determined that all of the former County's functions would be transferred to the Commonwealth if the Council were not created, the municipalities of the former County, rather than any state agency, approved the Charter. Similarly, although an act of the Legislature dissolved the County and outlined the procedure for creating the Council, it was the decision of the member municipalities, rather than a state-mandated requirement, to approve the Charter in order to continue to have some of the regional services of the former County. See *e.g.* *EC-COI-92-26* (Martha's Vineyard Collaborative created by municipalities as a means by which municipalities fulfill their educational responsibilities and is an instrumentality of those municipalities); *EC-COI-91-3* (the municipal level of government has the most direct and substantial interest in decisions of the Martha's Vineyard Commission). The Council is not, as the statutory definition of "state agency" requires, an "instrumentality within . . . any independent state authority, district, commission, instrumentality or agency" because the Council is accountable to only its members, who represent their respective municipalities, rather than to any current state official or state agency. See *McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 424-425 (1992).

In contrast, we concluded that the Metropolitan Area Planning Council (MAPC) is a state, rather than municipal, agency for purposes of the conflict law in *EC-COI-95-2* even though the MAPC provides some services similar to the Council's. For example, among other services, the MAPC conducts research and/or studies to help identify needs and formulate goals for the development and redevelopment of resources and facilities within MAPC's district. *Id.* These services, generally advisory in nature, are intended to supplement, rather than replace or regulate, the activities of local bodies such as planning boards, zoning boards or boards of aldermen. *Id.* We observed, however, the significance of the state's, rather than the municipalities,' control over the MAPC.

There are major differences between the MAPC and the Council. Approximately one-quarter of the MAPC members and *ex officio* members are selected by the Governor or are employees of state agencies and authorities while none of the Council is or is required to be a state employee or appointed by state officials. The Legislature created the MAPC to provide a "state regional planning function that is *separate* and *distinct* from each of its member municipalities' local planning bodies." *EC-COI-95-2* (emphasis added). The MAPC was established as a state agency<sup>7</sup> while the Council was established only after municipalities accepted the Charter. Finally, the legislation that dissolved Hampshire County government shows the Legislature retained for the Commonwealth functions of greater interest to the state while delegating to the Council other functions of greater interest to municipalities.

Although this is a hybrid entity, including both municipal and state attributes, we conclude that the Council has more attributes of a regional municipal entity. The Council, therefore, is a municipal agency for purposes of the conflict of interest law.

In *McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 428 n.5 (1992), the Appeals Court held that a regional school district is an instrumentality of each of its member municipalities, rather than an independent municipal entity, and that a member of the district's school committee is a municipal employee for purposes of the conflict of interest law. Since then, we have concluded that similar regional municipal agencies are also instrumentalities of each member municipality. See e.g., *EC-COI-92-26*; *EC-COI-92-27*; *EC-COI-92-40* (the Martha's Vineyard Land Bank Commission, to which each member town elects a representative, is not an independent municipal entity but rather an instrumentality of each member town). We have further concluded that a member of a regional municipal agency is a municipal employee of each member municipality. See e.g., *EC-COI-94-9* (a member of the Hampden-Wilbraham Regional School Committee who was elected by the Wilbraham voters is a municipal employee of both Wilbraham and Hampden). It follows, therefore, that, in your capacity as a Councilor, you are a municipal employee<sup>8/</sup> of each of the Council's member municipalities for purposes of the conflict law, although the Town of Amherst appointed you to the Council.  
*EC-COI-94-9*.<sup>9/</sup>

**DATE AUTHORIZED:** September 15, 1999

\*Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

<sup>1/</sup>The Council may impose a regional assessment up to the rate of .0001 of the equalized valuation of each member municipality as reported to the General Court by the Commissioner of Revenue in accordance with G. L. c. 58, § 10C. *Charter, Article Five, § 6(a)*. The Council's operating budget is approximately \$1,000,000. The operating budget for the Hampshire Care nursing facility is approximately \$5,000,000. In addition, the Council operates an insurance pool for municipalities, which is funded by premiums municipalities or municipal employees pay.

<sup>2/</sup>The Council assumed certain unfunded pension liabilities of former County employees. *St. 1998, c. 300, § 18, amending § 6, c. 48 of the Acts of 1997*. Those liabilities have been funded by contributions from the member municipalities.

<sup>3/</sup>You were appointed, rather than popularly-elected, because there was a tie in the municipal election. Under § 5 of the Charter, a vacancy because of a "failure to elect to the office of Council of Governments councilor shall be filled . . . by appointment in the towns by the board of selectmen."

<sup>4/</sup>"State agency," any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department, and any independent state authority, district, commission, instrumentality or agency, but not an agency of a county, city or town.  
*G. L. c. 268A, § 1(p)*.

<sup>5/</sup>"Municipal agency," any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder. *G. L. c. 268A, § 1(f)*.

<sup>6/</sup>We need not consider whether the Council is a county entity because the County as a form of government dissolved pursuant to legislation.

<sup>7/</sup>First established pursuant to St. 1963, c. 668, the MAPC was funded by an appropriation of the General Court, "charged as assessments upon the various cities and town comprising the district," such assessment to be certified by and paid to the state treasurer." *EC-COI-95-2*. We noted that St. 1963, c. 668 amended G. L. c. 6, § 17 to place the MAPC under the supervision of the Governor. *Id.*

<sup>8</sup>"Municipal employee," a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, . . . G. L. c. 268A, § 1(g).

<sup>9</sup>Your status as a municipal employee of each member municipality may be significant in applying other sections of G. L. c. 268A to your conduct. We recommend that you seek further advice from the Legal Division concerning your specific circumstances.